

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2018-319-E

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| In the Matter of: |) | |
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| Application of Duke Energy Carolinas, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order |) | |
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| |) | RESPONSE OF DUKE ENERGY CAROLINAS, LLC TO PETITIONS OF THE OFFICE OF REGULATORY STAFF AND THE SOUTH CAROLINA ENERGY USERS COMMITTEE |

Pursuant to S.C. Code Ann. §58-27-2150, the Rules of Practice and Procedure of the South Carolina Public Service Commission (“Commission”) and Order No. 2019-71H, Duke Energy Carolinas, LLC (“DE Carolinas”) submits the following consolidated response to the petition for clarification and reconsideration filed by the Office of Regulatory Staff (“ORS”) (the “ORS Petition”) and the petition for rehearing or reconsideration filed by the South Carolina Energy Users Committee (“SCEUC”) (the “SCEUC Petition”).

I. ORS PETITION FOR RECONSIDERATION AND CLARIFICATION

The ORS Petition seeks reconsideration of Order No. 2019-323 regarding the sufficiency of the notice that DE Carolinas provided in this proceeding and separately seeks clarification of a number of issues. This response will provide proposed findings of fact and conclusions of law explaining why the ORS position on the notice issue should be rejected. The response will also provide responses from DE Carolinas on certain items of clarification requested by the ORS.

A. ORS Request for Reconsideration – Notice Issue.

Findings of Fact (Notice Issue)

1. DE Carolinas filed its application in this proceeding on November 8, 2018. On November 28, 2018, the Clerk's office provided the Company with a notice for the filing and required that the notice be published in newspapers of general circulation by December 6, 2018 and that the notice be provided directly to all DE Carolinas customers by bill inserts by January 11, 2019.

2. On December 20, 2018, the Company filed affidavits showing that the notice provided by the Clerk's office had been published in newspapers in Greenville, Spartanburg, Rock Hill and Anderson. On January 31, 2019, DE Carolinas filed an affidavit attesting to its compliance with the requirement that the notice be provided directly to all customers.

3. The notice prepared by the Clerk's office and delivered to customers directly and by publication provided an overview of the relief requested in the Company's application including the fact that the Company was seeking an overall increase of 10% in rates amounting to an additional \$168 million in annual revenues. The notice provided an estimate that a typical residential customer using 1,000 kilowatt hours of electricity per month would see an increase of approximately \$15.57 per month. The notice provided specific information about the proposal of DE Carolinas to increase its monthly fixed charge, known as the Basic Facilities Charge ("BFC"), from \$8.29 to \$28.00 per month, but it did not provide any information about the volumetric component of any proposed rate.

4. The Commission's Document Management System ("DMS") shows that, following the publication of the notice, 13 parties intervened, including advocacy groups like the South Carolina NAACP, Upstate Forever, the Sierra Club, the South Carolina Coastal Conservation

League and the South Carolina Energy Users Committee. The DMS also shows that 807 people submitted letters to the Commission responding to the notice.

5. This Commission scheduled and held three night hearings in this proceeding in Spartanburg on March 12, 2019, in Anderson on March 13, 2019 and in Greenville on March 14, 2019. Prior to those night hearings, notice to customers was provided by: (1) publication in newspapers in Greenville, Spartanburg, Anderson and Rock Hill; (2) posting on the Company's website; and (3) directly by the Company to its customers through the use of its automatic telephone dialing system.

6. In response to the notice, hundreds of customers attended the three night hearings. Dozens of the people who attended also spoke to directly express their views on the Company's application. The most frequent subject of the testimony from customers at the night hearings was the proposed increase in the BFC. Customers who testified repeatedly stated their opposition to the BFC. The customer testimony on the subject showed they understood that there was an inverse relationship between the BFC and the volumetric component of the Company's rates. In fact, many customers expressed concern that the lower volumetric rates that would offset the increased BFC would reduce the value of their solar panels. Other customers expressed their opposition to the restructured rates because it would undercut and devalue their efforts to save money by minimizing their energy use.

7. Following the night hearings, DE Carolinas wrote this Commission to state that it would accept the BFC charges proposed by ORS witness Seaman-Huynh of \$11.96 for residential non-Time of Use customers; \$13.09 for residential Time of Use customers; and \$11.70 for Small General Service customers. That letter requested that the remaining revenue requirement ultimately determined by the Commission be recovered in the variable component

of such rates. The ORS responded to DE Carolinas' acceptance of the ORS-proposed BFC charges by raising for the first time the possibility that it would object to the volumetric component of any rate being higher than the level of that component shown in attachments to the Company's application.

8. The total rate of the Company includes a variable component and a basic facility charge fixed component and other charges, depending upon the actual tariff (some tariffs contain demand components). What is required to be noticed is the rate – the tariff – and there is no requirement to notice individual subcomponents of rates. Based on the decision of this Commission in Order No. 2019-323, the increase in the monthly bill of an average residential customer using 1,000 kilowatt hours of electricity per month is approximately \$4.71. This figure is well below the figure of \$15.57 that was provided in the notice required to be provided by this Commission.

Conclusions of Law (Notice Issue)

1. Article I, Section 22 of the South Carolina Constitution imposes due process requirements on actions of South Carolina administrative agencies: “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard...” The South Carolina Supreme Court has held that this provision guarantees persons the right to notice and an opportunity to be heard by administrative agencies. *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997).

2. The leading case on what notice is required to afford due process is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which approved of notice by

publication in certain circumstances. The court in *Mullane* described the notice requirement of the due process clause as follows:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, supra, p. 314.

3. The South Carolina Supreme Court has held that substantial prejudice must be shown to establish a due process claim. *Tall Tower, Inc. v. South Carolina Procurement Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987). The Court has also made it clear that due process is flexible and calls for such procedural protections as the particular situation requires. *Kurschner v. City of Camden Planning Department*, 376 S.C. 165, 656 S.E.2d 346 (2008).

4. These authorities show that the notice provided of the DE Carolinas Application in this proceeding easily meets the due process requirements of S.C. Const., Art. 1, §22. The notice informed DE Carolinas customers that the Company was asking for an overall 10% rate increase amounting to an additional \$168 million in annual revenues. The notice also provided an illustration showing that a residential customer, using 1,000 kWh would see an increase of approximately \$15.57 per month. The notice described in detail the proposed increase in the BFC from \$8.29 to \$28.00.

5. The effectiveness of the notice required by the Commission in this proceeding is best illustrated by the response it generated. Thirteen parties intervened, including influential advocacy groups like the S.C. NAACP, Upstate Forever, the Sierra Club and the South Carolina Coastal Conservation League. Many of these groups participated in this proceeding in a representative capacity advocating for customers. These groups brought substantial expertise to the proceeding and offered expert testimony on the issue of the proposed BFC. These experts

clearly and unmistakably understood the inverse relationship between the reduction in the BFC they were advocating and an increase in the volumetric component of the Company's proposed rates. It is significant that none of these parties has joined the ORS in its concern about the purported problem with the notice provided in the proceeding.

6. As recited in the Findings of Fact above, no fewer than 807 people submitted letters of protest responding to the notice, demonstrating the effectiveness of the notice. Further proof that DE Carolinas customers had ample notice of the Company's proposal, and an opportunity to be heard on it, was shown by the night hearings held in Spartanburg, Greenville and Anderson attended by hundreds of customers, and where the Commission heard directly from such customers, primarily residential customers. It is also clear from the testimony of those witnesses that there was widespread understanding among those customers of the inverse relationship between the reduced BFC that they advocated for and a higher volumetric component of the DE Carolinas rates.

7. The large response to the notice in this proceeding shows the notice meets the constitutional due process requirements cited in the ORS Petition. It stands in stark contrast to the notice provision considered by the South Carolina Supreme Court in *Porter v. South Carolina Public Service Commission*, 338 S.C. 164, 525 S.E.2d 866 (2000).¹ In that case the court considered a notice given for "rate adjustments" that failed to disclose that the adjustments included increases in certain rates of as much as 104%. There, the court found the notice lacking: "Taken as a whole, this notice is not informative and in fact is somewhat misleading since one could conclude the "proposed rate adjustments" merely refers to the reduction in toll switched access rates." *Porter, supra*, pp. 169-170. In contrast, the notice of the DE Carolinas

¹ In the *Porter* case, the court considered whether the notice had complied with the provisions of S.C. Code Ann. §58-9-530, a provision that applies to telephone utilities but not electrical utilities.

rate adjustment required by the Commission in this proceeding cannot possibly be criticized for failing to inform customers of the potential increase in rates being proposed by DE Carolinas, and it is clear that DE Carolinas customers received notice “reasonably calculated” to provide them the opportunity to be heard as required by *Mullane* and related cases.

8. The Commission has a constitutional responsibility to set rates in this proceeding that provide DE Carolinas with an opportunity to earn a fair and reasonable rate of return on its property devoted to serving the public. *Southern Bell Tel. & Tel. Co., v. Public Service Commission*, 270 S.C. 590, 244 S.E.2d 278 (1978), citing *Bluefield Water Works v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). The primary concern of many of the customers who responded to their opportunity to be heard, by writing letters of protest or showing up to speak at night hearings, was the DE Carolinas proposed increase in the BFC. The DE Carolinas letter accepting the BFC rates set out in ORS testimony was, in part, a response to the views of customers who exercised their right to be heard. The position taken by the ORS in its petition for reconsideration - that due process notice requirements somehow limit the Commission’s ability to respond to customer concerns by adjusting component elements of the DE Carolinas proposed charges – turns the relevant constitutional jurisprudence on its head and would lead to an absurd result. The *Tall Tower* case held that “substantial prejudice” must be shown to establish a due process claim. Contrary to the concern expressed by the ORS, substantial prejudice in this case would result from a ruling that this Commission could not respond to customer concerns about the BFC by exercising its ratemaking jurisdiction to adjust other components of rates in order to allow the Company its constitutionally protected opportunity to earn a fair rate of return.

9. The Commission's ratemaking jurisdiction is broad, including not only the setting of a revenue requirement, but allocation of that revenue requirement between classes and to fix just and reasonable rates. *See, e.g.*, S.C. Code Ann. 58-27-840 and 58-27-310. Under the theory of ORS, in rate cases, where the Commission is exercising its ratemaking jurisdiction to establish just and reasonable rates, and to ensure that those rates aren't unreasonably preferential to any customer class, the Commission would not be able to reallocate any revenue from one customer class to another that would go beyond what the Company proposed – an outcome that would be illogical and contrary to the Commission's grant of jurisdiction. Accordingly, ORS's interpretation of the notice requirement, if taken to its logical conclusion, would frustrate and bind the Commission's hands and contradict statutes *in pari materia* in violation of statutory construction principles.

10. The Commission holds that the notice provided by DE Carolinas in this proceeding met the requirements of Article I, Section 22 of the South Carolina Constitution.

B. ORS Requests for Clarification.

1. Working Capital Adjustment

In the ORS Petition, ORS requests clarification of the total Working Capital adjustment of \$83,971,000 cited on page 29 of the Commission's Order in this docket. (ORS Petition at 3.) ORS believes that the Net Working Capital Adjustment should be \$82,247,000. (*Id.*) In its compliance filing, the Company calculated a net cash working capital adjustment of \$82,221,000. (DE Carolinas Compliance Filing, Smith Exhibit 1 (Directive) at 4). The Company believes that its cash working capital adjustment calculation is reasonable and appropriate. As noted in the Company's proposed order, "while the amounts calculated by DE Carolinas and the ORS for this adjustment are different based on other areas of disagreement, the

Company and the ORS agree on the concept of and the method used to calculate this adjustment.” (DEC Proposed Order at 122-123). New rates based on the Company’s compliance filing are already in effect. To the extent this adjustment impacts the revenue requirement, given the *de minimis* difference between the Company’s calculation of the cash working capital adjustment and ORS’ calculation, the Company respectfully requests that current rates remain unchanged to avoid the expense and administrative burden of again revising customer rates.

2. Cost of Service Study and Methodology.

The ORS Petition requests the Commission confirm that the cost of service study (“COSS”) presented by the Company is to be used to allocate all revenues, expenses and rate base items, and to design rates for all customer classes, unless otherwise specified by the Commission. The Company supports the ORS’s request for confirmation. A preliminary step in ratemaking is to establish a cost of service study for cost allocation purposes between customer classes, while a subsequent step is to design rates influenced by that cost of service study. The Company believes the underlying COSS methodology used to allocate costs is appropriate for cost causation purposes is appropriate, as testified by ORS Michael Seaman-Huynh, even if the resulting rate design is ultimately adjusted for policy reasons, as has been done in this case.

3. Executive Compensation.

In the ORS Petition, ORS submits that the total downward adjustment for executive compensation should be (\$1,222,000) (ORS Petition at 4), which aligns with the Company’s calculation for the total downward adjustment for executive compensation shown in DEC Compliance Exhibit 1 at p. 3 line 29. Both the Company and ORS calculations correctly remove

75% of the South Carolina allocable portion of Duke Energy Chief Executive Officer's compensation per the Commission Order; thus, the Company agrees with the ORS calculation.

4. Accounting Orders.

The ORS Petition seeks clarification on the treatment of the Company's requests for accounting orders related to grid modernization, coal ash basin compliance costs, Customer Connect and credit card fees. The Company notes that no party contested or otherwise raised issue with the Company's deferral request for coal ash basin compliance costs.

In the present case, no party asserts that the incremental costs the Company is requesting to defer – which are not included in current rates – are in any way imprudent. Further, no party asserts that the incremental costs the Company is requesting to defer will somehow not be incurred or have been calculated incorrectly. DE Carolinas believes it is entirely appropriate to allow the Company to defer these incremental costs to give the opportunity to recover them at a later date in a subsequent rate case. Otherwise, the Company has no opportunity to recover prudently incurred costs for major investments. As noted in the Company's Proposed Order in this case, this Commission has long recognized the value of deferrals in mitigating rate increases and degradation to the Company's earnings. (*See* DEC Proposed Order at 65-67.) While some states might utilize regulatory mechanisms such as the use of forward test years, alternative ratemaking, or riders that would otherwise allow recovery of costs not included in rates, deferrals are a regulatory mechanism whereby the Company can defer rate cases and thus increases to customer rates to the benefit of customers by providing rate stability for longer durations between rate cases. The Commission has authorized deferral accounting for post-in-service costs of major generating plant additions from the date the units were placed in service to the date rates reflected the cost of the plants and costs related to abandoned plant. The Commission

has also found value in and granted deferral accounting for significant O&M expenses such as those incurred to comply with regulations for nuclear and cyber-security requirements.

The Company's specific responses to the treatment of certain deferrals included in the ORS Petition are below. Additionally, the Company notes that all deferrals for which the ORS seeks clarification were never addressed in their post-hearing brief filed in this proceeding.

(a) Grid Modernization deferral.

The ORS Petition seeks clarity on whether the Commission approved the Stipulation approved in Hearing Officer Directive 2019-26H whereby the parties agreed to a continuation of the Grid Modernization deferral. The Company submits that the Commission accepted the stipulation which governs the deferral and no additional clarification is needed.

(b) Coal ash deferral and amortization.

The ORS petition seeks clarity from the Commission on the Company's request to continue the deferral of the Company's costs incurred in connection with complying with federal and state environmental remediation requirements related to closing coal ash basins and other ash storage units, and the amortization period for previously deferred costs. The Commission originally approved the Company's request to defer these costs in Docket No. 2016-196, Order No. 2016-490. The ORS did not oppose the Company's request to continue to defer coal ash costs in this docket nor did the ORS contest the Company's underlying request in 2016 to establish the deferral.² Further, the Commission has acknowledged in general the distinction between deferral of ash compliance costs between rate cases versus requesting an ongoing level of these costs to be included in rates. (Order 2019-323 at 42.) The Company needs to maintain

² The North Carolina Utilities Commission approved the Company's request to defer ongoing coal ash related costs with a return until the Company's next rate case in North Carolina. *See Order Accepting Stipulation, Deciding Contested Issues and Requiring Revenue Reduction*, NCUC Docket No. E-7, Sub 1146, at 333 (June 2018).

the deferral treatment previously approved by the Commission and requested to continue to allow parties to examine ongoing costs for future recovery and to ensure the Company maintains its ability to recover prudently incurred costs.

The accounting treatment requested by the Company for its coal ash costs is critical. Absent the deferral, the Company's credit metrics will significantly weaken as calculated by Moody's and S&P. Both of these credit rating agencies published credit opinions in 2018 that describe how recovery of deferred coal ash costs is important to the Company in maintaining its financial strength. (Tr. Vol. 8, p. 1787-46.) If the Commission was to reverse its previous position on coal ash deferral accounting treatment, it would result in the write off of hundreds of millions of dollars of costs for accounting purposes and increase the likelihood of credit rating downgrades, both of which would impair the Company's financial stability and materially increase the Company's cost of capital. This deferral will allow the Company to bridge the timing gap until the Company's next rate case while continuing to comply with federal and state regulatory requirements. The Company believes this request is consistent with the case law and policy in this State of allowing unique regulatory treatment for environmental compliance costs.³ For these reasons, the Commission should approve the continued deferral accounting treatment for these costs until they can be sought for recovery and considered by the Commission in the next rate proceeding.

³ *In re: Joint Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC for an Accounting Order to Defer Certain Coal Ash Remediation Costs*, Docket No. 2016-196-E, Order No. 2016-490, p. 1 (approving a regulatory asset account for costs incurred in connection with complying with federal and state environmental remediation requirements related to closing coal ash basins and other ash storage units); *In re: Petition of SCE&G for Increases and Adjustments in Electric Rate Schedules and for Mid-period Reduction in Base Rates for Fuel*, Docket No. 2012-218-E, Order No. 2012-951, p. 34-35 (creation of Environmental Remediation Accrual Account to recover remediation costs associated with substation sites and disposal sites of obsolete electric distribution equipment.).

(c) Customer Connect operation and maintenance deferral.

The ORS petition seeks clarity on whether the Company is permitted to continue to defer O&M expenses associated with the ongoing deployment of the Customer Connect program as requested in the Company's Application. The Commission approved the establishment of this deferral in Docket No. 2018-207-E, Order No. 2018-552 (2018). The Company's support for the continuation of the deferral is identical to the support the Commission found persuasive (and the ORS did not find objectionable) when it approved the Company's petition to establish the deferral (*See* Docket No. 2018-207-E). Approximately 50 percent of the costs to deploy Customer Connect are incremental O&M expenses that are directly related to the project and would not exist but for the Customer Connect program. If the Company cannot recover the incremental operating expense in the year they are incurred, the Company has no future opportunity to recover a significant portion of the costs associated with this large investment absent approval of the deferral. Deferral treatment will allow the Company to bridge the timing gap between the expenses associated with these investments and the utilization of the Customer Connect system for the benefit of customers. Without the accounting treatment requested by the Company, these unrecovered expenses will not be included in rates resulting from this case, or the next – as the costs would have to be deferred to be included in the next case. Not allowing recovery of the costs between rate cases, when such costs are not allowed to be included in this or the next case, would negatively impact the Company's financials and lead to additional earnings degradation. For these reasons, the Commission should approve the continued deferral accounting treatment for these costs.

(d) Credit card fee deferral.

The ORS petition seeks clarity on whether the Company is permitted to establish a deferral for the incremental credit card fee expenses the Company expects to incur due to the establishment of the transaction fee-free credit card program. In her rebuttal testimony, Company witness Lesley Quick offered the establishment of a deferral as an alternative option to incorporating the Company's growth projection in its proposed adjustment. (Tr. Vol. 5, p. 984-8.) Since the Commission did not approve the adjustment for growth, the establishment of a deferral is appropriate to allow the Company an opportunity to recover the incremental expenses associated with the program in a subsequent rate case. Otherwise, the Company will be penalized for implementing a program designed to improve customer satisfaction with their payment experience by removing opportunities to be made whole once the costs to administer the program outweigh the amount recovered in rates, which is expected to occur as quickly as within the first year of implementation. For these reasons, the Commission should clarify approval of the establishment of deferral accounting treatment for these costs until they can be considered for recovery in the next rate case.

5. Rate base and net income for return.

In the ORS Petition, ORS requests that the Commission clarify the approved rate base and net income for return for DEC. (ORS Petition at 6.) The ORS also requests the Commission to clarify the calculation of the total Working Capital to include the adjustment by 1/8 of the change to O&M expense of (1,724,000), which would change the ORS' total suggested rate base of 5,447,405,000 (ORS Petition at 6) to \$5,445,681,000. This differs slightly from the Company's rate base of \$5,445,663,000, presumably due to the other immaterial differences in the Company's calculations as compared to the ORS.

Should the Commission wish to include these values in the order, the working capital figure of \$82,221,000 and total rate base \$5,445,683,000 are noted in the Compliance filing DEC Compliance Exhibit 1 (Directive) on page 4d and page 1, respectively.

II. SCEUC PETITION FOR REHEARING AND RECONSIDERATION

The SCEUC Petition requests reconsideration of the rulings in Order No. 2019-323 on the recovery by DE Carolinas of its Lee Nuclear construction costs and its costs of remediation of coal ash at its W.S. Lee generating station, and the approval by the Commission of the pricing mechanism used in the Company's Real Time Pricing tariff. This response will explain why the SCEUC position on those issues should be rejected, and the Company has provided proposed findings of fact and conclusions of law in particular for the coal ash arguments.

A. Lee Nuclear Construction Costs.

Over the course of the Lee Nuclear Project, South Carolina law provided multiple avenues for a utility to seek recovery of its preconstruction costs. The Base Load Review Act ("BLRA") provided two avenues under which the Company could seek recovery of its costs. First, if the utility decided to go forward with construction of the project, the utility could seek a base load review order. *See* S.C. Code Ann. § 58-33-270. A base load review order would allow the utility to recover its costs through either revised rate filings or general rate proceedings. *See* S.C. Code Ann. §§ 58-33-275(C), 58-33-280(B). South Carolina Electric & Gas Company ("SCE&G"), the co-owner of the V.C. Summer project, pursued this course. Second, a utility with a project development order ("PDO") under the BLRA could decline to move forward and abandon the project. In this case, the utility would collect its abandonment costs, including carrying costs. *See* S.C. Code Ann. § 58-33-225(G). The BLRA's provision for recovery of

preconstruction costs that are the subject of a PDO were distinct from those provisions relating to the recovery of costs to construct a plant that is the subject of a base load review order.

Separate from the BLRA, this Commission's precedent provides for the recovery of abandonment costs through base rate cases. Particular to abandonment costs, such costs can be, and have been, sought for recovery through base rate cases. *See, e.g., Order Approving Rates and Charges*, In re: Application of Duke Power Company for Authority to Adjust and Increase its Electric Rates and Charges, Order No 83-92, Docket No 82-50-E (March 15, 1983) at 22-23, 46-47. Neither the passage nor repeal of the BLRA has abrogated this independent avenue of recovery for a utility's abandonment costs.

As clearly indicated at the outset of this case, DE Carolinas has sought recovery under the Commission's existing precedent regarding the recovery of abandoned investment and not under the abandonment provisions of the BLRA. Witness Fallon's direct testimony stated:

While I am not a lawyer, I have been advised that because DE Carolinas does not currently have any requests made pursuant to Article 4, Chapter 33, Title 58 pending before the Commission, it is unable to request recovery of the abandoned Lee Nuclear Project preconstruction costs pursuant to S.C. Code Ann. §58-33-225(G).

(Tr. Vol. 4, p. 805-25.) Witness Fallon's testimony continued:

I have been advised that prior to the enactment of the BLRA, Commission precedent allowed recovery of prudently incurred abandoned plant cost and that this precedent is still applicable today as an independent basis for recovery separate from the recovery provisions previously available to the Company under the BLRA.

(*Id.* at 805-25 – 805-26.) The filing of this case represents DE Carolinas' first and only request for recovery of the South Carolina-allocable portion of its Lee Nuclear Project. As explained in Company witness Fallon's testimony, DE Carolinas' request was not under the repealed provisions of the BLRA, which were no longer available as a procedural avenue for recovery at the time of DE Carolinas' filed the present case. (*See id.*)

The BLRA does not preclude DE Carolinas from recovering its investment in the Lee Nuclear Project under the Commission's precedent. The BLRA provided for the utility to seek initial or additional PDOs at its option. There is no language in the BLRA to support SCEUC's contention that the BLRA became the exclusive avenue for recovery of the investment in the Lee Nuclear Project. The plain language of the BLRA makes it clear that filing a project development application is permissive and is not a prerequisite to the recovery of project development costs. *See* S.C. Code Ann. § 58-33-225(B).

The Company was not required to obtain approval prior to incurring project development costs. *See id.* The relevant provision of the BLRA states:

At any time before the filing of an application or a combined application under this act related to a specific plant, a utility **may** file a project development application with the commission and the office of regulatory staff.

Id. (emphasis added). The BLRA's use of the term "may" implies that filing a project development application under the BLRA is permissive and not mandatory. *See id.* Furthermore, the BLRA indicates that the project development application may be filed "[a]t any time before the filing of an application or a combined application..." *Id.* While the plain language of the BLRA restricts the filing date of a project development application to precede a utility's base load review application or combined application, the statute contains no requirement that the project development application be filed prior to incurring project development costs. *See id.*

DE Carolinas was not required to seek additional PDOs in order to recover its investment under the BLRA. Following the initial PDO, the BLRA states that "a utility **may** file an amended project development application seeking a determination of the prudence of the utility's decision to continue to incur preconstruction costs..." S.C. Code Ann. § 58-33-225(I) (emphasis added).

Nothing in the BLRA implies that once a PDO is obtained, only those funds specifically pre-authorized by the PDO are recoverable.

The repeal of the BLRA (Act 258, R. 287, H. 4375 (2018)) (“Act 258”) does not displace the Commission’s abandoned plant precedent. SCEUC’s Petition provides at least three different formulations of the General Assembly’s intent with respect to the passage of Act 258. These formulations include:

“The General Assembly has repealed the BLRA to prohibit Duke recovery of its preconstruction costs.” (SCEUC Petition at 2.)

“In repealing S.C. Code Ann. Section 58-33-225, the General Assembly intended to protect ratepayers from payment of nuclear capital costs that are not used and useful.” (*Id.* at 3.)

“The Commission has overlooked and misapprehended that the intent of the General Assembly in enacting Act 258, R287, H4375, Section 2.A was to deprive Duke recovery of its nuclear preconstruction costs entirely.” (*Id.* at 4.)

In support of these statements, SCEUC cites either to section 2.A of Act 258 or to materials that predate the introduction of Act 258 into the General Assembly. The cited materials do not support the proposition that the General Assembly enacted Act 258 specifically to prevent DE Carolinas from recovering its existing investment in Lee Nuclear Project. Section 2.A of Act 258 provides:

As of the effective date of this act, the Public Service Commission must not accept a base load review application, nor may it consider any requests **made pursuant to Article 4, Chapter 33, Title 58** other than in a docket currently pending before the commission.

Act 258 § 2.A (emphasis added). The plain language of Act 258 applies to requests made “pursuant to” the BLRA, and DE Carolinas request was not made pursuant to the BLRA, as explained in more detail above. In other words, if the BLRA were still in effect, DE Carolinas could have used a request pursuant to S.C. Code Ann. §58-33-225(G) as the procedural vehicle to seek recovery for its investment in Lee Nuclear Project. However, because the Commission

may not consider requests pursuant to the BLRA other than those in a pending docket under Act 258, DE Carolinas made its request under the Commission's existing abandoned plant precedent, which is undisturbed by Act 258.

The focus of the General Assembly in considering Act 258 was on the failure of the V.C. Summer project and not on DE Carolinas' decision not to proceed to construction on Lee Nuclear Project. If the legislature had intended to foreclose recovery of all nuclear pre-construction costs, including under the Commission's existing precedent, the legislature could have certainly formulated more direct language to this effect. In fact, Act 258 allowed SCE&G to recover substantial amounts of its investment in the V.C. Summer project, which was far greater than the amount DE Carolinas has invested in Lee Nuclear Project, further undermining SCEUC's position that Act 258 serves to deny recovery for nuclear project abandonment costs.

The legislative debate of Act 258 further contradicts SCEUC's formulation of the General Assembly's intent regarding Lee Nuclear Project. During the South Carolina Senate's discussion of a proposed Judiciary Committee amendment to H. 4375 (which ultimately resulted in Act 258), Senator Massey responded to questions from other senators regarding the proposed amendments. During these discussions, Senator Massey explained with regard to DE Carolinas investment in Lee Nuclear Project:

There are other statutory provisions they could use to recover those costs. They just have to prove that it was prudent to do those things. Whereas, as the senator from Charleston was talking about, it's a whole lot easier under the Base Load Review Act. It's basically on autopilot. So there would be an additional avenue there if Duke wanted to do that, but this would prevent Duke from filing an application under the Base Load Review Act because we are cutting off applications now.

See <http://www.scstatehouse.gov/video/archives.php>, May 9, 2018, Senate Part 2 recording at approximately 3:38:50.⁴ In response to a question regarding whether Duke had recovered any amounts to date from customers for Lee Nuclear Project, Senator Massey explained further:

There is another avenue that Duke could pursue under other portions in the code to do that. It's just kind of a different process, but there is a process available if they wanted to pursue that.

See *id.* at approximately 3:43:10. Considering these statements in the broader context of Act 258, the legislative intent in Act 258 was not to deny DE Carolinas recovery of its investment in Lee Nuclear Project.

The Commission's Order in this case does not render an "absurd" result. SCEUC's assertion to this effect results from SCEUC's unsupported assertion that the purpose of Act 258 was to deny recovery of DE Carolinas' investment in Lee Nuclear Project. Because the Commission rejects this premise, the result of the Order is not absurd.

DE Carolinas' request for recovery of its investment in Lee Nuclear Project in this case does not require an "inconsistent" "nature of proof", as SCEUC has asserted. The SCEUC Petition does not explain with specificity what different proof is required, what elements of proof are missing, or why any supposed difference would preclude DE Carolinas from seeking recovery of its investment in this case. The SCEUC Petition attempts to apply the doctrine of election of remedies to the present circumstances; however, this doctrine is wholly inapplicable to this case. First, the present proceeding concerns the setting of utility rates, not the pursuit of a remedy to correct a legal wrong. Second, DE Carolinas has made a single request for recovery under the Commission's precedent, not multiple inconsistent requests. Third, the nature of proof

⁴ DE Carolinas is unaware of official transcripts for these discussions in the South Carolina Senate and provides this informal transcription for the convenience of the parties.

for recovery of abandoned plant costs under the BLRA and under the existing precedent is not inconsistent.

B. W.S. Lee Coal Ash Remediation Costs.

Findings of Fact (W.S. Coal Ash Remediation Costs)

1. On September 23, 2014, the Company entered into a consent agreement with the South Carolina Department of Health and Environmental Control (“SCDHEC”) which required excavation of two inactive ash units W.S. Lee Steam Station – the Inactive Ash Basin (“IAB”) and the Ash Fill Area (“AFA”). *See* Consent Agreement, *In re: Duke Energy Carolinas, LLC W.S. Lee Steam Station Anderson County*, Docket No. 14-13-HW (Sept. 23, 2014) (the “Consent Agreement” or the “Agreement”).

2. As recited in the text of the agreement, SCDHEC entered into the Consent Agreement pursuant to its authority under the South Carolina Hazardous Waste Management Act, S.C. Code Ann. § 44-56-10, *et seq.*, the Pollution Control Act, S.C. Code Ann. § 48-1-10 *et seq.*, and the South Carolina Solid Waste Policy and Management Act. S.C. Code Ann. §44-96-10, *et seq.* Each of the cited laws authorize SCDHEC to issue orders, assess civil penalties, conduct studies, investigation, and research to abate, control, and prevent pollution and to protect the health of persons and/or the environment.

3. Prior to execution of the Consent Agreement, other electric utilities in South Carolina had agreed to excavate the vast majority of their coal ash units, so the Consent Agreement was consistent with actions already being taken in the State to remediate coal ash and largely viewed as a positive step toward addressing the State’s coal ash impoundments.

4. Since executing the Consent Agreement, SCDHEC has approved excavation plans for the Primary Ash Basin, Secondary Ash Basin, IAB and AFA at the W.S. Lee facility, and

DEC has begun implementing those plans in order to comply with the terms of the CCR Rule and Consent Agreement.

5. Accordingly, the Company requested and the Commission granted recovery of the shared costs incurred to comply with the Consent Agreement, \$98.5 million of which was allocated to South Carolina customers.

6. SCEUC now challenges the Commission's decision on the grounds that SCDHEC lacked the authority to require excavation of the coal ash units at W.S. Lee and therefore lacked authority to enter into the Consent Agreement. Its argument, however, is lacking on a number of grounds.

7. First, SCEUC does not suggest or provide any reasoned basis for the Commission to conclude that SCDHEC lacked authority to enter into the Consent Agreement pursuant to the statutes cited therein.

8. Second, SCEUC failed to distinguish the coal ash units at W.S. Lee. SCEUC is wrong that the coal ash ponds at W.S. Lee were not subject to CCR rule. The Primary Ash Basin and Secondary Ash Basin are both covered by the CCR rule and are being excavated in compliance with the CCR rule. *See* Kerin Direct. T. Exhibit 10. The Consent Agreement only covers the IAB and the AFA. SCEUC's oversimplified argument ignores this important distinction, and SCEUC did not submit any testimony during the hearing and it does not cite to any evidence now to show what portion of the overall coal ash remediation costs incurred at the W.S. Lee facility are attributable to the IAB and AFA only.

9. Third, S.C. Code Ann. Section 58-27-255 was enacted *after* the Consent Agreement was entered, so SCEUC's argument that the statute invalidated SCHEC's authority to enter the Agreement in 2014 is illogical. Further, SCEUC mischaracterizes the purpose of the

statute which regulates the location for the final placement of CCR, not how or when existing or legacy ash storage units must be remediated.

10. In addition, the Consent Agreement has not been invalidated by any judicial body with authority to act in this State, and the Public Service Commission does not have authority to reverse or invalidate any act of a sister regulatory body. To the contrary, if any citizen or advocacy group was an aggrieved party who wished to challenge the legality of the Consent Agreement, it could have filed a request for contested case with the Administrative Law Court. S.C. Code Ann. 1-23-310 *et seq.*

11. Finally, the North Carolina Utilities Commission has approved the Company's request to recover the shared costs from North Carolina customers that were incurred to comply with the Company's excavation obligations in South Carolina. *See* Order, Docket No. E-7, Sub 1146, pp. 266, 332 (June 22, 2018).

Conclusions of Law (W.S. Coal Ash Remediation Costs)

1. The South Carolina Supreme Court has held that a utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286 (1992) (internal citations omitted). Other parties are therefore required to produce evidence that overcomes this presumption, as well as any evidence the utility has proffered that further substantiates its position. *See Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110 (2011) ("[I]f an investigation initiated by ORS or by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures.").

2. SCEUC has not overcome the presumption that DEC's costs to comply with the Consent Agreement are reasonable and were incurred in good faith.

3. The Consent Agreement is valid. It was entered into pursuant to SCDHEC's authority under the South Carolina Hazardous Waste Management Act, S.C. Code Ann § 44-56-10, *et seq.*, the Pollution Control Act, S.C. Code Ann. § 48-1-10 *et seq.*, and the South Carolina Solid Waste Policy and Management Act. S.C. Code Ann. §44-96-10, *et seq.* The cited statutes give SCDHEC the authority to regulate and require remediation of active and legacy surface impoundments, CCR landfills, and other ash storage units.

4. The Consent Agreement is consistent with the goals and policies of the State of South Carolina to protect the health of South Carolina citizens and the environment.

5. DEC is required to comply and is complying with the terms of the Consent Agreement.

6. It would be inequitable and contrary to South Carolina cost recovery standards to prohibit shared recovery of these costs—that were incurred to comply with a duly entered Consent Agreement that applies to the remediation of a South Carolina basin—from South Carolina customers when North Carolina customers are already bearing their portion of such costs.

C. Real Time Pricing Tariff.

Contrary to SCEUC's position, the Commission did not overlook SCEUC's recommendation that the hourly rate in the Company's rate schedule LGS-RTP be set at the lower of the Company's marginal cost or a wholesale market rate available at the time of the sale. Rather, by the Commission's approval of its cost allocation methodology, with stated exceptions, it chose not to adopt SCEUC's recommendation. Further, SCEUC's recommendation is inconsistent with how the Company's rate schedule was designed and intended and is unfair to the Company's other customers.

The RTP tariff is a voluntary rate option that offers large customers the opportunity to purchase incremental energy at a rate calculated based upon the Company's marginal cost of the generator that is expected to serve the next kWh of system load based upon all available generating plants.

The Company explained that its RTP rates are based on the Company's system production costs; and are not designed or intended to represent or be a proxy for wholesale market-based pricing. In other words, the RTP tariff is not intended to be a mechanism for the Company to shop the wholesale market for low cost electricity on behalf of RTP customers and allow them to choose between the current wholesale market price and a rate based upon the Company's marginal cost to generate an additional kWh.

The Company testified that it constantly shops the wholesale market for the benefit of all of its customers and purchases wholesale power when wholesale prices are lower than the cost the Company would incur if it generated the power itself. In this way the savings resulting from the wholesale market are enjoyed by all of the Company's customers not just a select few. The Company explained that applying hourly rates that are lower than the Company's marginal system production costs would potentially result in other customers subsidizing RTP customers if the forecasted non-firm purchase wasn't available when needed or if other conditions such as transmission constraints wouldn't allow the purchase to occur.

CONCLUSION

For these reasons, the Company asserts that the Commission should reject ORS' petition for reconsideration on the Commission's determination that DE Carolinas provided sufficient notice to its customers about the potential rate increase notice. The Company also asserts that it is appropriate and supported by the record for the Commission to reject SCEUC's petition for

rehearing or reconsideration for (1) the Commission's approval of the recovery by DE Carolinas of its Lee Nuclear construction costs; (2) recovery of remediation costs related to coal ash at the W.S. Lee generating station; and (3) the approval by the Commission of the pricing mechanism used in the Company's Real Time Pricing tariff. Finally, the Company believes it appropriate for the Commission to clarify the Commission's decisions on the issues presented by the ORS, and issue an Order approving the Accounting Order requests included in the Company's Application in this Docket.

Dated this 12th day of June, 2019.

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